Simpson Thacher

Insurance Law Alert

April 2022

In This Issue

Alaska Court Rules That Computer Fraud Provision Covers Losses Resulting From Email Impersonation Scheme

Addressing a matter of first impression under Alaska law, a federal court ruled that a Computer Fraud provision in a crime policy covered losses arising from an email impersonation scheme. *City of Unalaksa v. National Union Fire Ins. Co.*, 2022 WL 826501 (D. Alaska Mar. 18, 2022). (Click here for full article)

Minnesota Court Rules That Replacement Of Credit/Debit Cards Following Data Breach Constitutes "Loss Of Use Of Tangible Property"

A Minnesota district court vacated its prior decision and held that an insurer was obligated to indemnify Target Corp.'s data breach settlement payment because the cost of replacing cancelled credit and debit cards constituted a loss of use of tangible property under a general liability policy. *Target Corp. v. ACE American Ins. Co.*, 2022 WL 848095 (D. Minn. Mar. 22, 2022). (Click here for full article)

Finding No Allegations Of An "Occurrence," California Court Rules That Insurer Need Not Defend Opioid Suits

A California district court granted insurers' summary judgment motion, finding that underlying opioid suits did not allege a covered "occurrence," notwithstanding negligence causes of action in the underlying complaints. *AIU Ins. Co. v. McKesson Corp.*, 2022 WL 1016575 (N.D. Cal. Apr. 5, 2022). (Click here for full article)

California Appellate Court Rules That Insurers Are Not Obligated To Indemnify Lead Paint Abatement Fund Payment

A California appellate court ruled that insurers were not obligated to indemnify a payment to a lead paint abatement fund under California Insurance Code section 533, which precludes indemnification for losses caused by the insured's willful acts. *Certain Underwriters at Lloyd's London v. ConAgra Grocery Products Co.*, 2022 WL 1164981 (Ct. App. Cal. Apr. 19, 2022). (Click here for full article)

Ohio Supreme Court Rules That Incorporation Of A Defective Ingredient Into Integrated Product Constitutes Property Damage Caused By An Occurrence

The Ohio Supreme Court held that the incorporation of a defective component into an integrated product constituted property damage under an umbrella policy. *Motorists Mutual Ins. Co. v. Ironics, Inc.*, 2022 WL 852346 (Ohio Mar. 23, 2022). (Click here for full article)

"[Simpson Thacher's] expertise ranges from direct insurance coverage of virtually all kinds, through to reinsurance matters and cases relating to insurance companies' business practices."

–Chambers New York 2021

"Excess Judgment" Requirement May Be Based On Consent Judgement Rather Than Verdict, Says Eleventh Circuit

Applying Florida law, the Eleventh Circuit ruled that a plaintiff may establish the requisite "excess judgment" for a bad faith claim through a consent judgment, and that a trial verdict is not required. *McNamara v. Government Employees Ins. Co.*, 2022 WL 1013043 (11th Cir. Apr. 5, 2022). (Click here for full article)

First New York Appellate Court Affirms Dismissal Of Restaurants' COVID-19 Coverage Suit

A New York appellate court affirmed the dismissal of a suit seeking property insurance coverage for pandemic-related business losses. *Consolidated Restaurant Operations, Inc. v. Westport Ins. Corp.*, 2022 WL 1040376 (N.Y. App. Div. 1st Dep't Apr. 7, 2022). (Click here for full article)

Virginia Supreme Court Denies Review Of Hotels' COVID-19 Coverage Suit

The Virginia Supreme Court declined to accept an appeal from several hotels seeking property insurance coverage for COVID-19-related business losses, finding no error in a lower court's dismissal of the policyholder's suit. *Crescent Hotels & Resorts LLC v. Zurich American Ins. Co.*, 2022 WL 1124493 (Va. Apr. 14, 2022). (Click here for full article)

Seventh Circuit Rules That Viral Presence On Property Is Not Direct Physical Loss Or Damage

The Seventh Circuit ruled that an Illinois district court properly dismissed COVID-19-related property coverage claims based on the absence of allegations of direct physical loss or damage. *East Coast Entertainment of Durham, LLC v. Houston Cas. Co.*, 2022 WL 1086377 (7th Cir. Apr. 12, 2022). (Click here for full article)

In Two Rulings, Fifth Circuit Affirms Dismissal Of COVID-19-Related Coverage Suits

The Fifth Circuit issued two decisions affirming Louisiana district court dismissals of policyholders' claims seeking coverage for pandemic-related losses under property policies. *Q Clothier New Orleans, L.L.C. v. Twin City Fire Ins. Co.*, 29 F.4th 252 (5th Cir. 2022); *Louisiana Bone & Joint Clinic, L.L.C. v. Transportation Ins. Co.*, 2022 WL 910345 (5th Cir. Mar. 29, 2022). (Click here for full article)

Maryland District Court Properly Dismissed Policyholder's Coverage Suit, Says Fourth Circuit

The Fourth Circuit affirmed a Maryland district court order dismissing a suit seeking business interruption coverage for income losses incurred in the wake of government shutdown orders. *The Cordish Companies, Inc. v. Affiliated FM Ins. Co.*, 2022 WL 114373 (4th Cir. Apr. 14, 2022). (Click here for full article)

Another Illinois Court Rules That Violation Of Statutes Exclusion Does Not Bar Coverage For BIPA Claims

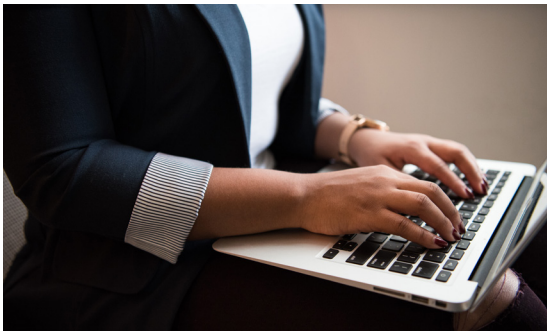
An Illinois court has ruled that a statutory violations exclusion was ambiguous and does not bar coverage for claims alleging violations of the Biometric Information Privacy Act. *Citizens Ins. Co. of Am. v. Wynndalco Enterprises, LLC*, 2022 WL 952534 (N.D. Ill. Mar. 30, 2022). (Click here for full article)

Cyber Alerts:

Alaska Court Rules That Computer Fraud Provision Covers Losses Resulting From Email Impersonation Scheme

Addressing a matter of first impression under Alaska law, a federal court ruled that a Computer Fraud provision in a crime policy covered losses arising from an email impersonation scheme. *City of Unalaksa v. National Union Fire Ins. Co.*, 2022 WL 826501 (D. Alaska Mar. 18, 2022).

A fraudster sent an email to an employee of the City of Unalaska, purporting to be a vendor and requesting a change in payment method. Thereafter, employees of the City followed the protocol for implementing a payment change and ultimately sent wire transfer payments totaling nearly $3 million to the fraudster's bank account. National Union paid the $100,000 limit under an Impersonation Fraud Coverage endorsement, but denied coverage under the Computer Fraud provision. The City sued for breach of contract and declaratory relief and the court ruled in the City's favor.



The Computer Fraud provision provided coverage for loss of money or other property "resulting directly from the use of any computer to fraudulently cause a transfer of that property." National Union argued that the "incidental" use of a computer to send fraudulent emails did not constitute "direct" use of a computer and that this provision was intended to cover incidents such as hacking or malware. Additionally, National Union contended that the intervening actions of City employees, as well as the thirty-day period between the fraudster's initial email and the first payment to his account, severed the causal chain between any purported computer fraud and the loss.

The court rejected these arguments and ruled that a reasonable insured would expect Computer Fraud coverage under these circumstances. The court relied on the Ninth Circuit's recent decision in *Ernst & Hass Management Co., Inc. v. Hiscox, Inc.*, 23 F.4th 1195 (9th Cir. 2022) (discussed in our February 2022 Alert), which held that a Computer Fraud provision covered email impersonation loss because the loss "resulted directly" from use of a computer to fraudulently cause a transfer of property, notwithstanding an employee's actions in effectuating the transfer. The court also relied on A*merican Tooling Center, Inc. v. Travelers Cas. & Sur. Co. of Am.*, 895 F.3d 455 (6th Cir. 2018) (discussed in our July/August 2018 Alert), in which the Sixth Circuit ruled that fraudulently induced wire transfers were a "direct loss" and that the insured company's multi-step authorization process did not qualify as an intervening action sufficient to break the causal chain.

The Fifth Circuit reached contrary conclusions in *Apache Corp. v. Great American Ins. Co.*, 662 Fed. App'x 252 (5th Cir. 2016) (discussed in our November 2016 Alert) and *Mississippi Silicon Holdings, LLC v. Axis Ins. Co.*, 843 Fed. App'x 581 (5th Cir. 2021) (discussed in our February 2021 Alert). However, the *Unalaska* court deemed those decisions unpersuasive and distinguishable based on the policy language.

Minnesota Court Rules That Replacement Of Credit/Debit Cards Following Data Breach Constitutes "Loss Of Use Of Tangible Property"

Our February 2021 Alert discussed a decision that held that an insurer was not obligated to indemnify Target Corp.'s data breach settlement payment because the cost of replacing cancelled credit and debit cards did not constitute a loss of use of tangible property under a general liability policy. *Target Corp. v. ACE American Ins. Co.*, 2021 WL 424468 (D. Minn. Feb. 8, 2021). This month, the Minnesota district court vacated its decision and granted Target's summary judgment motion. *Target Corp. v. ACE American Ins. Co.*, 2022 WL 848095 (D. Minn. Mar. 22, 2022).

Following a breach of Target's computer networks, several banks that had issued the compromised credit and debit cards cancelled

and reissued those cards to customers. The banks sued Target for the costs associated with those actions. The parties eventually settled, and Target sought indemnification from ACE.

In its original ruling, the court granted ACE's summary judgment motion, finding that Target failed to demonstrate covered property damage, defined as the "loss of use of tangible property that is not physically injured." The court explained that Minnesota law requires loss-of-use damages to be "based on" the loss of use of the tangible property, and that here, there was no nexus between the settlement payment and the value of the loss of the use of the payment cards.

Vacating that decision, the court concluded that the inoperability of payment cards following a data breach constitutes a loss of use under the policy. Addressing this matter of first impression under Minnesota law, the court explained: "Cancellation of the compromised payment cards rendered the payment cards inoperable. The payment cards lost their use. Although the compromised payment cards still existed . . . they could no longer serve their function." The court further held that Minnesota's causation requirement was satisfied because Target's expense in settling the banks' claims "was a cost incurred due to the loss of use of the payment cards."

Finally, the court held that the policy requirement of "tangible property that is not physically injured" was met. The insurer argued that coverage was unavailable because Target sought compensation for the stolen data and the policy expressly excluded electronic data from the definition of tangible property. The court rejected this contention, reasoning that it was the use of the "payment cards, not the use of electronic data, that was lost."

Opioid Alert:

Finding No Allegations Of An "Occurrence," California Court Rules That Insurer Need Not Defend Opioid Suits

A California district court granted insurers' summary judgment motion, finding that underlying opioid suits did not allege a covered "occurrence," notwithstanding negligence causes of action in the underlying complaints. *AIU Ins. Co. v. McKesson Corp.,* 2022 WL 1016575 (N.D. Cal. Apr. 5, 2022).

McKesson, a distributor and seller of prescription drugs, was named as a defendant in numerous lawsuits alleging negligence, statutory violations and common law claims based on its role in marketing and distributing opioid products. Its insurers denied coverage and sought a declaration that they had no duty to defend or indemnify the claims.

The court ruled that the underlying suits alleged damages "for" or "because of" bodily injury because they alleged "sickness, addictions, overdoses, and deaths." Further, the court held that when government plaintiffs seek damages reflecting the costs incurred to provide various opioid-related services, such costs are for bodily injury. The court deemed it irrelevant that the government entities themselves did not suffer bodily injury, noting that "nothing in the policies limits coverage to suits that seek damages for the plaintiff's own bodily injury." Similarly, the court rejected the insurers' contention that the suits sought only economic damages, explaining that damages because of bodily injury may be measured in monetary terms, but that does not transform them into purely economic losses. In concluding that the suits alleged bodily injury, the court expressly disagreed with the reasoning and conclusion in *ACE American Ins. Co. v. Rite Aid Corp.*, 270 A.3d 239 (Del. 2022) (holding that government

entities' claims for the money it spent on the opioid epidemic were not damages "because of" bodily injury) (discussed in our January 2022 Alert).

However, the court ruled that the insurers had no duty to defend because the underlying claims failed to allege an "occurrence," which is an "accident" or "unexpected, unforeseen, or undesigned happening" under California law. Emphasizing that an accident is defined by the initial act itself rather than its consequences, the court held that virtually all of the conduct alleged in the complaints was intentional. The court acknowledged that each complaint included at least one negligence claim, but concluded that those claims were based directly on deliberate and intentional conduct. The court rejected McKesson's argument that because the complaints included "should have known" language, they alleged accidental conduct, explaining that such an argument "conflates the issues of whether the injury was foreseeable and whether the 'injury-producing acts of the insured' were deliberate."

Coverage Alerts:

California Appellate Court Rules That Insurers Are Not Obligated To Indemnify Lead Paint Abatement Fund Payment

A California appellate court ruled that insurers were not obligated to indemnify a payment to a lead paint abatement fund under California Insurance Code section 533, which precludes indemnification for losses caused by the insured's willful acts. *Certain Underwriters at Lloyd's London v. ConAgra Grocery Products Co.*, 2022 WL 1164981 (Ct. App. Cal. Apr. 19, 2022).

Multiple government agencies in California sued lead paint manufacturers, alleging representative public nuisance. The complaint alleged that the defendants created or assisted in creating a public health crisis by promoting lead for paint use despite knowledge that lead was hazardous to human health. That matter resulted in a final judgment against the defendants, requiring payments to be made into a lead abatement fund. Insurers sought a declaration that they had no duty to indemnify for several reasons, including that section 533 prohibits coverage for the intentional act of promoting lead paint. A California trial court agreed and granted the insurers' summary judgment motion. The appellate court affirmed.

Section 533, which provides that "[a]n insurer is not liable for a loss caused by the willful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured's agents or others," is an implied exclusionary clause in all insurance policies. The appellate court concluded that section 533 applied because the underlying litigation established that Fuller (the corporate predecessor to ConAgra) intentionally promoted lead paint for interior use with knowledge of the harmful nature of such use.

ConAgra argued that section 533 did not apply because it precludes coverage for losses due to willful acts of the insured and ConAgra, the insured, committed no wrongful acts and was liable only as Fuller's

corporate successor. The court rejected this assertion as unsupported by case law. Alternatively, ConAgra contended that even if application of section 533 turns on Fuller's conduct (rather than ConAgra's) the statute is inapplicable because there is an insufficient causal connection between Fuller's willful acts and the abatement fund payment for which ConAgra sought indemnification. Rejecting this argument, the court stated: "ConAgra provides no support for its contention that section 533 could not be found to apply in this case absent proof that specific promotions by Fuller directly resulted in the need for inspection or abatement in each home for which ConAgra was liable for payment."

Finally, the court ruled that the underlying findings established as a matter of law that Fuller acted with the knowledge required for section 533 to apply. In particular, the court held that the finding in the underlying case that Fuller promoted lead paint with actual knowledge that it would deteriorate and result in injury was sufficient to satisfy the "willful act" requirement of section 533.

Ohio Supreme Court Rules That Incorporation Of A Defective Ingredient Into Integrated Product Constitutes Property Damage Caused By An Occurrence

The Ohio Supreme Court held that the incorporation of a defective component into an integrated product constituted property damage under an umbrella policy. *Motorists Mutual Ins. Co. v. Ironics, Inc.*, 2022 WL 852346 (Ohio Mar. 23, 2022).

Ironics, a metal product company, sold tube scale to another company to be used in the production of glass containers. After the containers were manufactured, it was discovered that the tube scale was contaminated and that incorporation of the contaminated tube scale increased the likelihood that the glass containers would break. Because the contaminated component could not be removed from the containers, the glass company destroyed nearly two tons of product and then sued Ironics. Ironics' umbrella insurer sought a declaration it had no duty to defend or indemnify the claims.

The Ohio Supreme Court ruled that the incorporation of Ironics' defective product into the glass containers constituted "property damage" caused by an "accident." In particular, the court held that there was damage to tangible property other than Ironics' own property, emphasizing that damage to the glass containers (the final product) is not the same as damage to Ironics' tube scale (a component of that product).

Deeming the policy language unambiguous and outcome-determinative, the court declined to apply the integrated-system rule, as set forth in *Wisconsin Pharmacal Co., LLC v. Nebraska Cultures of California, Inc.*, 2016 WL 785203 (Wis. Mar. 1, 2016) (discussed in our March 2016 Alert). There, the Wisconsin Supreme Court held that the incorporation of a defective ingredient into a nutritional supplement tablet was not "property damage" caused by an "occurrence."

Bad Faith Alert:

"Excess Judgment" Requirement May Be Based On Consent Judgement Rather Than Verdict, Says Eleventh Circuit

Applying Florida law, the Eleventh Circuit ruled that a plaintiff may establish the requisite "excess judgment" for a bad faith claim through a consent judgment, and that a trial verdict is not required. *McNamara v. Government Employees Ins. Co.*, 2022 WL 1013043 (11th Cir. Apr. 5, 2022).

The dispute arose out of an automobile accident. The injured party sued the driver and the owner of the car and later served them with a "demand for judgment" under Florida statutory law. The settlement demand

provided for payments by the driver and owner that exceeded the owner's policy limits and was conditioned upon (1) consent of the owner and driver to final judgment in the prescribed amounts, and (2) confirmation by the automobile insurer that it would not assert breach of contract against the driver or owner by accepting the proposal. The insurer agreed, and the court entered final judgments against the owner and driver. Thereafter, the owner and driver sued the insurer for bad faith, seeking to recover the amounts of the final judgment that exceeded the policy limit.

A Florida district court granted the insurer's summary judgment motion, ruling that for purposes of establishing causation in a bad faith action, Florida law requires the plaintiff to establish an "excess judgment" resulting from a verdict. The Eleventh Circuit reversed, holding that a consent judgment arising from a stipulated settlement agreement can constitute an "excess judgment" for purposes of asserting bad faith.

The Eleventh Circuit expressly disavowed *Cawthorn v. Auto-Owners Ins. Co.*, 791 Fed. App'x 60 (11th Cir. 2019), an unpublished opinion holding that only a judgment that follows a trial and results from a verdict qualifies as an "excess judgment."

COVID-19 Alerts:

First New York Appellate Court Affirms Dismissal Of Restaurants' COVID-19 Coverage Suit

A New York appellate court affirmed the dismissal of a suit seeking property insurance coverage for pandemic-related business losses. *Consolidated Restaurant Operations, Inc. v. Westport Ins. Corp.*, 2022 WL 1040376 (N.Y. App. Div. 1st Dep't Apr. 7, 2022).

The owner of several restaurants sought coverage for business losses incurred in the wake of government closure orders. The insurer denied coverage, arguing that the actual or suspected presence of COVID-19 particles did not constitute physical loss or damage to property, as required by the policy. In ensuing litigation, a New York trial court dismissed the policyholder's complaint. The appellate court affirmed.

The appellate court held that the policy was unambiguous and required some "physical" change or damage to property, rather than a mere loss of use. The court concluded that the complaint failed to allege such damage to property, despite references to actual viral particles on insured property, because no property had to be replaced or repaired. In addition, the court emphasized that the restaurants were able to provide limited services during the relevant time frame, thus further supporting the conclusion that the property was not physically damaged. As the court noted, decisions applying New York law have uniformly rejected the argument that COVID-19 causes such physical damage.

Virginia Supreme Court Denies Review Of Hotels' COVID-19 Coverage Suit

The Virginia Supreme Court declined to accept an appeal from several hotels seeking property insurance coverage for COVID-19-related business losses. *Crescent Hotels & Resorts LLC v. Zurich American Ins. Co.*, 2022 WL 1124493 (Va. Apr. 14, 2022). A Virginia trial court had granted the insurers' motion to dismiss, finding that "physical loss or damage" was unambiguous and did not encompass claims that the virus was present at insured property. *Crescent Hotels & Resorts, LLC v. Zurich American Ins. Co.*, 2021 WL 3679210 (Va. Cir. Ct. Aug. 18, 2021). The trial court also held that exclusions for contamination and pollution barred coverage in any event. In a summary order, the Virginia Supreme Court refused the petition for appeal, finding "no reversible error" in the judgment below.

Seventh Circuit Rules That Viral Presence On Property Is Not Direct Physical Loss Or Damage

The Seventh Circuit ruled that an Illinois district court properly dismissed COVID-19-related property coverage claims based on the absence of allegations of direct physical loss or damage. *East Coast Entertainment of Durham, LLC v. Houston Cas. Co.*, 2022 WL 1086377 (7th Cir. Apr. 12, 2022). Citing to its decision in *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*, 20 F.4th 327 (7th Cir. 2021) (discussed in our December 2021 Alert), the court held that the presence of viral particles at insured property is insufficient to allege direct physical loss or damage because the virus does not alter the physical structure or constitute a "use-deprivation so substantial as to constitute a physical dispossession." Notably, the court also held that there was no conflict between Illinois and North Carolina law regarding the meaning of "direct physical loss," and that under the law of either state, the policy was unambiguous and did not cover the policyholder's business losses.

In Two Rulings, Fifth Circuit Affirms Dismissal Of COVID-19-Related Coverage Suits

Last month, the Fifth Circuit issued two decisions affirming Louisiana district court dismissals of policyholders' claims seeking coverage for pandemic-related losses under property policies. In *Q Clothier New Orleans, L.L.C. v. Twin City Fire Ins. Co.*, 29 F.4th 252 (5th Cir. 2022), the court held that coverage for "direct physical loss of or damage to property" does not encompass business income losses related to government shutdown orders. The court explained that the loss of income "is not tangible. Nor is it an alteration, injury or deprivation of property. Q Clothier's property has been unchanged by the orders." In addition, the court concluded that there was no civil authority coverage because the executive orders were aimed at slowing the spread of the virus, and were not issued "as a direct result" of a covered cause of loss to nearby property. The court reasoned that the lack of causation between any loss or damage to nearby property and the civil authority orders was fatal to a claim for civil authority coverage.

Citing to its decision in *Q Clothier*, the Fifth Circuit affirmed the dismissal of COVID-19 claims in *Louisiana Bone & Joint Clinic, L.L.C. v. Transportation Ins. Co.*, 2022 WL 910345 (5th Cir. Mar. 29, 2022). There, the court rejected the policyholder's assertion that the business income provision was ambiguous and that physical loss of or damage to property could reasonably be interpreted to include loss of use.

Maryland District Court Properly Dismissed Policyholder's Coverage Suit, Says Fourth Circuit

The Fourth Circuit affirmed a Maryland district court order dismissing a suit seeking business interruption coverage for income losses incurred in the wake of government shutdown orders. *The Cordish Companies, Inc. v. Affiliated FM Ins. Co.*, 2022 WL 114373 (4th Cir. Apr. 14, 2022). The district court concluded that allegations of infected individuals or of viral presence near or at insured property did not constitute direct physical loss or damage to property, explaining that "[t]he term 'physical,' as used in the Policy, 'clearly indicates that the damage must affect the good itself, rather than the Plaintiff's use of that good.'" *The Cordish Companies, Inc. v. Affiliated FM Ins. Co.*, 2021 WL 5448740 (D. Md. Nov. 22, 2021) (citations omitted). The district court also ruled that the lack of physical damage to property was fatal to the claim for civil authority coverage. Finally, the court ruled that coverage would be barred in any event by a contamination exclusion. Finding no reversible error in the district court's holdings, the Fourth Circuit summarily affirmed.

Privacy Alert:

Another Illinois Court Rules That Violation Of Statutes Exclusion Does Not Bar Coverage For BIPA Claims

Another Illinois court has ruled that a statutory violations exclusion does not bar coverage for claims alleging violations of the Biometric Information Privacy Act ("BIPA").

Last year, the Illinois Supreme Court ruled that an insurer must defend a suit alleging BIPA violations, finding that a violation of statutes exclusion did not apply. *West Bend Mutual Ins. Co. v. Krishna Schaumburg Tan, Inc.*, 2021 WL 2005464 (Ill. May 20, 2021) (discussed in our May 2021 Alert). In that case, the exclusion specifically referenced two statutes, the TCPA and the CAN-SPAM Act of 2003, and also included a "catch-all" provision that applied to "any statute, ordinance or regulation" that prohibits or limits the distribution of material or information. The Illinois Supreme Court reasoned the catch-all provision applied only to statutes that regulate methods of communication (such as telephone calls, emails or faxes) and did not extend to BIPA, which regulates the collection of certain personal data.

Last month, an Illinois district court addressed the same issue and reached the same conclusion in a case involving a policy with slightly different language. In *Citizens Ins. Co. of Am. v. Thermoflex Waukegan, LLC*, 2022 WL 602534 (N.D. Ill. Mar. 1, 2022), the exclusion listed three statutes: the TPCA, the CAN-SPAM Act of 2003 and the FCRA. Additionally, the catch-all provision in the exclusion contained "somewhat broader" language than that presented in *West Bend*. Nonetheless, the court ruled that BIPA claims did not unambiguously fall within the exclusion. (*See* March 2022 Alert).

More recently, another Illinois district court, faced with the nearly identical policy language to that at issue in *Thermoflex*, ruled that the exclusion was ambiguous and did not bar coverage for alleged BIPA violations. *Citizens Ins. Co. of Am. v. Wynndalco Enterprises, LLC*, 2022 WL 952534 (N.D. Ill. Mar. 30, 2022). There, the court acknowledged that the "BIPA, like the other enumerated statutes, 'regulates the dissemination, disposal, collecting, recording, sending, transmitting, communicating or distribution of . . . information.'" However, it reasoned that to construe the exclusion to cover BIPA claims based on the BIPA's regulation of information would make certain coverage provisions illusory because "most statutes 'regulate information' to some degree." In so ruling, the court expressly disagreed with *Massachusetts Bay Ins. Co. v. Impact Fulfillment Services, LLC*, 2021 WL 4392061 (M.D.N.C. Sept. 24, 2021) (discussed in our October 2021 Alert), in which the court ruled that a nearly identical exclusion applied to BIPA claims.

Simpson Thacher

Simpson Thacher has been an international leader in the practice of insurance and reinsurance law for more than a quarter of a century. Our insurance litigation team practices worldwide.

Mary Beth Forshaw
+1-212-455-2846
mforshaw@stblaw.com

Chet A. Kronenberg
+1-310-407-7557
ckronenberg@stblaw.com

Craig S. Waldman
+1-212-455-2881
cwaldman@stblaw.com

Andrew T. Frankel
+1-212-455-3073
afrankel@stblaw.com

Lynn K. Neuner
+1-212-455-2696
lneuner@stblaw.com

George S. Wang
+1-212-455-2228
gwang@stblaw.com

Bryce L. Friedman
+1-212-455-2235
bfriedman@stblaw.com

Joshua Polster
+1-212-455-2266
joshua.polster@stblaw.com

Summer Craig
+1-212-455-3881
scraig@stblaw.com

Michael J. Garvey
+1-212-455-7358
mgarvey@stblaw.com

Tyler B. Robinson
+44-(0)20-7275-6118
trobinson@stblaw.com

Isaac M. Rethy
+1-212-455-3869
irethy@stblaw.com

This edition of the
Insurance Law Alert
was prepared by
Bryce L. Friedman / +1-212-455-2235
bfriedman@stblaw.com and
Mary Beth Forshaw / +1-212-455-2846
mforshaw@stblaw.com
with contributions by Karen Cestari
kcestari@stblaw.com.

Simpson Thacher Worldwide

UNITED STATES

New York
425 Lexington Avenue
New York, NY 10017
+1-212-455-2000

Houston
600 Travis Street, Suite 5400
Houston, TX 77002
+1-713-821-5650

Los Angeles
1999 Avenue of the Stars
Los Angeles, CA 90067
+1-310-407-7500

Palo Alto
2475 Hanover Street
Palo Alto, CA 94304
+1-650-251-5000

Washington, D.C.
900 G Street, NW
Washington, D.C. 20001
+1-202-636-5500

EUROPE

Brussels
Square de Meeus 1, Floor 7
B-1000 Brussels
Belgium
+32-472-99-42-26

London
CityPoint
One Ropemaker Street
London EC2Y 9HU
England
+44-(0)20-7275-6500

ASIA

Beijing
3901 China World Tower A
1 Jian Guo Men Wai Avenue
Beijing 100004
China
+86-10-5965-2999

Hong Kong
ICBC Tower
3 Garden Road, Central
Hong Kong
+852-2514-7600

Tokyo
Ark Hills Sengokuyama Mori Tower
9-10, Roppongi 1-Chome
Minato-Ku, Tokyo 106-0032
Japan
+81-3-5562-6200

SOUTH AMERICA

São Paulo
Av. Presidente Juscelino
Kubitschek, 1455
São Paulo, SP 04543-011
Brazil
+55-11-3546-1000